STATE OF MICHIGAN

COURT OF APPEALS

SECURA INSURANCE and ERWIN KUESTER,

Plaintiffs-Appellants,

v

REEDS LAKE INN, INC. and AMERICAN STATES INSURANCE COMPANY,

Defendants-Appellees

and

PENG YU-CHUN KO,

Defendant.

UNPUBLISHED
December 21, 2001

No. 222339
Kent Circuit Court
LC No. 97-007330-NO

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment allowing defendant American States Insurance Company to recover $125,000 from Secura Insurance. We affirm.

This is a declaratory judgment action to determine the extent to which two insurance companies are liable for a $250,000 settlement paid on an underlying personal injury claim. The injury occurred in a back hallway of a building owned by Erwin Kuester, who was insured by plaintiff Secura Insurance, and who leased a portion of the building to the Reeds Lake Inn, which was insured by defendant American States Insurance Company. The hallway was not a part of the premises described in the Reeds Lake Inn's lease, but the proprietor of the restaurant had permission to use the hallway to access a bathroom and some basement storage space.

Plaintiffs contend that the trial court erred in denying their motion for summary disposition, which alleged that the Reeds Lake Inn was liable for the injury in the hallway pursuant to ¶ 9 of the lease, which provided as follows:

> **INDEMNIFICATION OF LESSOR:** Lessor shall not be liable for any damage or injury to Lessee, or any other person, or to any property, occurring on *the demised premises or any part thereof*, and Lessee agrees to hold Lessor harmless from any claims for damages, no matter how caused. [Emphasis added.]

We review de novo the trial court's summary disposition ruling. When reviewing a motion under MCR 2.116(C)(10), we must examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 219-220; 600 NW2d 427 (1999).

Several well-established principles guide our interpretation of the parties' lease agreement. Where contractual language is clear, its construction is a question of law that we review de novo. *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). An indemnity contract is construed in the same fashion as are contracts generally. The cardinal rule in the interpretation of a contract is to ascertain the intent of the parties. The court must look for the intent of the parties in the words used in the instrument, and may not make a different contract for the parties or look to extrinsic evidence to determine their intent when the words comprising the contract are clear and unambiguous and have a definite meaning. *Zurich Insurance Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603-604; 576 NW2d 392 (1997).

Plaintiffs argue that *Wagner v Regency Inn Corp*, 186 Mich App 158; 463 NW2d 450 (1990), controls the interpretation of the instant indemnity provision. In *Wagner*, this Court interpreted an indemnity provision in a lease agreement whereby the lessee agreed to "indemnify and hold harmless [the lessor] from any liability for damages to any person or property *in, on or about said premises* from any cause whatsoever." *Id*. at 167 (emphasis added). This Court found that the language in the lease was plain and unambiguous and "so broad it can only be construed as applicable to plaintiff's claim," which arose from an injury that occurred in a parking lot that surrounded the leased premises. *Id*. at 168.

We agree, however, with the trial court that the "on or about" indemnity language in *Wagner* was broader that the phrase "or any part thereof" employed in this case, which can only refer to the immediately preceding "demised premises" described in the lease as "701 Bagley 420 sq. ft. with additional 250 sq. ft. of basement storage."[1] While this reading renders the words "or any part thereof" redundant or surplusage, we nonetheless find that the unambiguous phrase "any part thereof" cannot be interpreted as extending to areas beyond the "demised premises" itself. Accordingly, we conclude that *Wagner* is factually distinguishable and that the trial court correctly rejected plaintiffs' proposed interpretation of the instant lease's indemnification provision.

Plaintiffs next argue that the trial court erred when it found that Kuester's tenants had a license to use the building's common areas, but nonetheless held that the existence of a license did not make the hallway and restroom parts of the demised premises. Plaintiffs claim that the Reeds Lake Inn had either a "license coupled with an interest" or an "implied easement appurtenant" in the use of the hallway, thereby making that area part of the "demised premises." Plaintiffs did not raise these arguments in the trial court, but we may consider unpreserved questions of law when the facts necessary for their resolution have been presented. *Poch v*

[1] An addendum to the lease stated that "Lessor shall provide a restroom facility. [sic] for Chinese Restaurant."

Anderson, 229 Mich App 40, 52; 580 NW2d 456 (1998). We review unpreserved issues for plain error. To avoid forfeiture under the plain error rule, three requirements must be met: (1) the error must have occurred, (2) the error was plain, and (3) the plain error affected substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Even if the Reeds Lake Inn possessed an irrevocable license to use the hallway for the duration of its lease term, or an implied easement appurtenant to use the hallway, *Forge v Smith*, 458 Mich 198, 210-211; 580 NW2d 876 (1998); *Powers v Harlow*, 53 Mich 507, 513-514; 19 NW 257 (1884), plaintiffs have not demonstrated that such rights would give rise to liability for purposes of indemnification under ¶ 9 of the lease agreement, which explicitly applies indemnification only for injuries that occur on the "demised premises." We conclude that plaintiffs have failed to demonstrate a plain error that affected their substantial rights.

Plaintiffs lastly assert that the trial court erred in finding that Kuester had exclusive possession and control over the hallway and that he therefore retained full liability for the injuries incurred in that area. Premises liability is conditioned on the presence of both possession and control over the land. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660, 662; 575 NW2d 745 (1998). Liability for an injury due to defective premises ordinarily depends upon the power to prevent the injury and therefore rests primarily upon him who has control and possession. *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942). Common areas such as halls, lobbies or stairs leased to no individual tenant remain the responsibility of the landlord, who must insure that these areas are kept in good repair and reasonably safe for the use of his tenants and invitees. *Samson v Saginaw Professional Building, Inc*, 393 Mich 393, 407; 224 NW2d 843 (1975).

Kuester himself testified that he exercised his right as the landlord to control what occurred in the hallway of his building. The record reflects that Kuester exercised his possession and control over the hallway by instructing the proprietor of the Reeds Lake Inn verbally and in writing to remove his boxes of cabbage from the hallway, by threatening not to renew the lease in the event of the proprietor's noncompliance, and by hiring someone to seal cracks in the hallway and elsewhere to prevent cooking odors from escaping the Reeds Lake Inn. Kuester also testified that he replaced a night light bulb in the hallway whenever it burned out. The proprietor testified that he had no authority to prevent Kuester from storing items in the hallway, and that he obtained permission from Kuester's wife to store his cabbage in the hallway. The proprietor occasionally did sweep or mop the hall area near the door of the leased premises pursuant to a paragraph in the lease that required him to keep the common area clean. In light of this evidence, we cannot conclude that the trial court clearly erred in finding that Kuester had sole possession and control over the hallway.[2] *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

---

[2] To the extent that plaintiffs rely on *Siegel v Detroit City Ice & Fuel Co*, 324 Mich 205; 36 NW2d 719 (1949), for the proposition that the parties had joint control and possession of the hallway, we find *Siegel* distinguishable from the instant case. In *Siegel*, the area where the injury occurred was leased to a theater while the landowner itself expressly retained part of the same area for its own use. *Id.* at 207. The issue involved whether the landowner had retained sufficient possession and control over the leased property to be held liable. Because the

(continued…)

Accordingly, we conclude that the trial court correctly found plaintiffs liable for the entire amount of the personal injury settlement.

Affirmed.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

(…continued)

landowner retained the right to use some of the same area that it had leased to the theater, the Supreme Court found that both parties had joint possession and control over the area. *Id*. at 213-214. In this case, the hallway where the injury occurred was not a part of the premises leased by Reeds Lake Inn, but constituted part of the common areas used by all tenants of the building while leased by none of them.